IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 7, 2009 Session

# MARTIN WILLIAM HUFFMAN v. ANGELA SHAYNE HUFFMAN

**Appeal from the Circuit Court for Davidson County**
**No. 02D-1467 Muriel Robinson, Judge**

---

**No. M2008-02845-COA-R3-CV - Filed November 24, 2009**

---

In this post-divorce dispute, father challenges the trial court's denial of his petition to be made the primary residential parent as well as the court's modification of the parenting schedule and its child support award. We have determined that the trial court erred in failing to make the required findings to justify an upward deviation in child support. Otherwise, we affirm the decision of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Vacated and Remanded in Part**

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Jacob Thomas Thorington, Franklin, Tennessee, for the appellant, Martin William Huffman.

Phillip Robb Robinson, Nashville, Tennessee, for the appellee, Angela Shayne Huffman.

## OPINION

### FACTUAL AND PROCEDURAL BACKGROUND

Martin William Huffman ("Father") and Angela Shayne Huffman ("Mother") obtained an irreconcilable differences divorce in December 2002. Under the terms of the agreed parenting plan, Mother was the primary residential parent for the parties' three minor children. Father had parenting time with the children on certain weekends from Friday at 6:00 p.m. until Monday at 8:00 a.m.[1] and every Wednesday night. Father also had parenting time for four weeks during the summer. The parenting plan further provided that Father would pay child support of $1,338.00 per month except during the month of July and that "[t]his deviation from the Child Support Guidelines is based on

[1] During odd-numbered months, Father had the children every other weekend; during even-numbered months, he had them the first, third, and fourth weekends of the month.

the Father's increased visitation with the children as set forth herein."[2] Mother had sole decision-making authority with respect to the children's education, but the parties were to make joint decisions with respect to extracurricular activities and non-emergency medical decisions.

In September 2006, Father filed a petition to modify the parenting plan and name him the primary residential parent as well as a petition for contempt. Asserting a material change in circumstances since the original divorce decree, Father alleged that Mother did not properly supervise the children, failed to pay their school tuition on a timely basis, failed to insure the children had money for school lunches on a regular basis, refused to send clothing with the children when they went to stay with Father, was often late getting the children to and from school, was unable to "competently discipline" the children, had a bad temper, failed to provide the oldest child with his attention deficit disorder ("ADD") medication on a regular basis and sometimes gave him another family member's medication instead, and failed to make sure the children had proper hygiene. Father maintained that he was "the primary source of stability, discipline and care for the children." Even if the court chose not to name him the primary residential parent, Father requested that child support be recalculated based upon a significant change in his income and the need to consider Mother's income. The basis for Father's contempt petition was Mother's alleged failure to provide him with proof of unreimbursed medical expenses and failure to pay her part of the medical bills, resulting in adverse consequences in Father's credit rating.

Mother responded to Father's petitions in November 2006 with an answer and counterclaim to modify the residential parenting schedule. Mother alleged there had been a material change in circumstances since the original divorce decree. According to Mother, the children's overnight visits with Father on school nights (Wednesdays and some Sundays) had resulted in a number of problems. This schedule allegedly interfered with the children's preparations for school the next day, resulting in incomplete homework and inadequate sleep. Furthermore, alleged Mother, there were "numerous instances when the children have not had proper clothing or have left items at the Father's house which results in disruption in the children's school day or residential time with the Mother." Mother requested modification of the residential parenting schedule. She also asserted that she paid all of the children's private school tuition and requested that the court review child support and require Father to pay all or a portion of the children's tuition.[3]

---

[2] The parenting plan did not state the income of Father or Mother.

[3] Mother paid the entire amount of the children's tuition at a private school. In the 2007-2008 school year, Mother moved the children to public schools, and Father subsequently asserted his desire that the children return to private schooling.

In January 2007, the Court restrained both parties from taking their daughter to a psychologist or counselor pending further court order and restrained Father from videotaping the daughter while she was sleeping.[4]

The case was heard over two days in August 2008 and consisted of testimony from Father, Mother, all three children, Father's wife, Michael Loring (Father's former co-worker), and Terri Rudd (Mother's friend and neighbor). In its order dated September 11, 2008, the court found that the parenting plan "has generally worked well and to the best interest of the children" and that "there are absolutely no problems with these children in either home other than issues typical to teenagers, pre-teens and nine year olds." The court was impressed with all three children, their love and respect for both parents, and their excellent school performance. While commending Father's involvement with the children, the court found that "Mother in particular has done an excellent job being the primary parent of these children." The court denied Father's modification petition based upon the following reasoning:

> The Court finds that the issues and problems raised by the Father as a basis to modify the primary residential parent are irrelevant, immaterial, unsubstantiated by the evidence in this case or so trivial in nature as to not come close to establishing any material change of circumstance and the Court is at a loss as to why this Petition was filed giving rise to two years of expensive litigation.
>
> The Court finds that there is no material change of circumstance in this cause and that the Petition of the Father is frivolous and is denied and dismissed.

The court also dismissed Father's contempt petition, finding the allegations to be "without foundation."

The court went on to grant Mother's petition to modify the residential parenting schedule, finding that "there has been a change of circumstance in that the children are now older, and their school and extracurricular schedules have changed thus justifying a modification of the parenting time in this cause." The court eliminated Father's overnight visitation on Wednesdays and Sundays during the school year only. Furthermore, the children were to be returned to Mother from Father's summer parenting time one full day before the start of the school year.

The court also ordered Mother to take the youngest child for an eye examination and to make the results available to Father and to make an appointment for the oldest child to see his physician to determine whether the child should continue to take medications for ADD. In the event the oldest child was to continue taking ADD medications, the parents were to give the medication as directed, and Mother was ordered to provide Father with the medication during his parenting time.

---

[4] According to testimony at the hearing in August 2008, Father's wife videotaped the child in an attempt to document alleged problems with nightmares.

On the issue of child support, the court ordered an upward deviation from the guideline amount on the basis that Mother needed to maintain the current level of child support; the court provided that the child support would be reviewed in 90 days. The court also awarded Mother her attorney fees in the amount of $18,420.00.

Father filed a motion to alter or amend the court's September 2008 order requesting elimination of the finding that Father's petition was frivolous and of the award of attorney fees to Mother. The court denied Father's motion. This appeal followed.[5]

On appeal, Father argues that the trial court erred in denying his petition to be named the primary residential parent, in granting Mother's petition to modify the parenting schedule, in refusing to modify his child support obligation, in excluding certain evidence, and in finding his petition frivolous and awarding Mother her attorney fees. Mother argues that Father's appeal is frivolous and asks this court to award her attorney fees on appeal.

## ANALYSIS

### Petition to change primary residential parent

In cases involving custody and visitation, our review of the trial court's findings of fact is de novo with a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Marlow v. Parkinson*, 236 S.W.3d 744, 748 (Tenn. Ct. App. 2007). When the trial court makes no specific findings of fact, however, we must review the record to determine where the preponderance of the evidence lies. *Kendrick*, 90 S.W.3d at 570.

Determinations regarding custody and visitation "often hinge on subtle factors, including the parents' demeanor and credibility during the divorce proceedings themselves." *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996). We "give great weight to the trial court's assessment of the evidence because the trial court is in a much better position to evaluate the credibility of the witnesses." *Boyer v. Heimermann*, 238 S.W.3d 249, 255 (Tenn. Ct. App. 2007). Moreover, trial courts necessarily have broad discretion to make decisions regarding parenting arrangements to suit the unique circumstances of each case. *See Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Chaffin v. Ellis*, 211 S.W.3d 264, 286 (Tenn. Ct. App. 2006). We will not disturb a trial court's parenting arrangement unless its decision is based on a material error of law, is contrary to the preponderance of the evidence, or is against logic or reasoning. *Eldridge*, 42 S.W.3d at 85; *Birdwell v. Harris*, No. M2006-01919-COA-R3-JV, 2007 WL 4523119, at *6 (Tenn. Ct. App. Dec. 20, 2007); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997).

[5] A review hearing on child support was held in January 2009. The court determined that the proof was insufficient to justify a reduction in child support. The transcript of the review hearing does not appear in the record on appeal.

It is well-established that, in order to modify a parenting plan to change the primary residential parent, the trial court must apply a two-part analysis: the court must find that "both a material change of circumstances has occurred and a change of custody is in the child's best interests." *Kendrick*, 90 S.W.3d at 575. Tenn. Code Ann. § 36-6-101(a)(2)(B) is the relevant statutory provision as to what constitutes a material change of circumstance in the context of a custody change:

> If the issue before the court is a modification of the court's prior decree pertaining to custody, the petitioner must prove by a preponderance of the evidence a material change in circumstance. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.

As noted by the court in *Kendrick*, "'[t]here are no hard and fast rules for determining when a child's circumstances have changed sufficiently to warrant a change of his or her custody.'" *Kendrick*, 90 S.W.3d at 570 (quoting *Blair v. Bandenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)). Several factors to consider when making this determination are whether the change occurred after the entry of the order to be modified, whether the asserted change was known or reasonably anticipated at the time of the original order's entry, and whether the change "'affects the child's well-being in a meaningful way.'"*Id.* (quoting *Blair*, 77 S.W.3d at 150).

Father argues that the evidence preponderates against the trial court's finding that there had been no material change in circumstances. Father focuses this argument around three main subjects: medication and medical care, supervision, and school lunches and clothing. According to Father's testimony, Mother did not provide him with the oldest child's ADD medication on a regular basis and did not make sure that the child took the medication regularly. Father saw a significant change in the child's behavior when he was not taking the medication. Mother testified that she made the oldest child take his ADD medication when he was in school but admitted that sometimes they would run out of the medication and that Mother did not like the medication. The school would not allow the children to bring medications to school and only one prescription could be filled at a time; Mother had problems getting the medication to Father when the children were with him. The trial court ordered Mother to make an appointment for the oldest child to see his doctor and for Father to be there and stated that, if it was determined that the child should continue on the medication, "Mother shall provide the medication to the Father during the Father's parenting time with the child."

Father also testified that he had noticed problems with the youngest child's eye sight. When asked by the trial court why he had not taken the child to the eye doctor, Father explained that, based upon the court's previous order directing the parents not to take the children to counselors without court approval, he had understood that he should not take the child to any doctor. Mother testified that she had the youngest child's eyes tested by the pediatrician about a year earlier and that Father

had only mentioned the issue again about a week before the hearing, and Mother had not yet made an appointment in the two days since the children had been back from vacationing with Father. The Court directed her to make an appointment to have the child's eyes checked.

Another issue raised at the hearing was the daughter's alleged problems with anxiety and night terrors. Father testified that he and his wife had observed the daughter having nightmares and not wanting to go upstairs alone. Mother testified that, while the daughter had shown some minor symptoms of anxiety after the divorce or when adjusting to new living environments, these issues had resolved themselves.

Father cites several cases in support of his argument that a failure to provide dental or medical care should constitute a material change of circumstances. We find both cases distinguishable from the present case. In *Baker v. Baker*, No. W1999-02660-COA-R3-CV, 2000 WL 1346650 (Tenn. Ct. App. Sept. 15, 2000), the custodial parent admitted to neglecting the child's dental needs, and the court also found that the child's physical and mental needs were compromised by the parent's "neglect of parental responsibilities." *Id.* at *2. Unlike the present case, *Baker* involved evidence of intentional neglect of a child's needs with significant effects on the child's well-being. In *Roache v. Bourisaw*, No. M2000-02651-COA-R3-CV, 2001 WL 1191379 (Tenn. Ct. App. Oct. 10, 2001), there were a number of factors supporting the trial court's change of custody, including interference with visitation rights, neglect of medical and dental needs of the child, and neglect of the child's educational needs. *Id.* at *7-8.

As to the second main topic argued by Father, Mother's alleged lack of supervision, there is again conflicting testimony. While Father testified about his concern that the children were left at Mother's house without adult supervision, he could only testify from personal knowledge about "a couple of times" when he went to Mother's house and found the children there alone. Father expressed concern about the oldest child being expected to watch the two younger children, especially when he was not taking his ADD medication; Father felt this arrangement had caused friction between the two boys.[6] Father testified that he had "almost never" left the oldest child in charge of the other two children when they were at his house. Mother acknowledged that she left the oldest child at home babysitting his two younger siblings "on occasion," but she also stated that her husband was often there with the children when she was gone. In the year prior to the hearing, Mother's parents lived immediately behind her house.

The cases cited by Father regarding lack of supervision are distinguishable from the present case. In *Bjork v. Bjork*, No. 01A01-9702-CV-00087, 1997 WL 653917 (Tenn. Ct. App. Oct. 22, 1997), there was evidence of violence and abuse within the mother's home as well as evidence that the four-year-old child frequently played outside without supervision and had almost been hit by a car on one occasion. *Id.* at *4. The present case does not involve these kinds of dangers. As stated in Father's brief, *Smith v. Smith*, No. 03A01-9508-CH-00292, 1996 WL 33177 (Tenn. Ct. App. Jan.

[6] At the time of the modification hearing in 2008, the oldest child was 17 years old and the youngest was 9 years old.

30, 1996), involved multiple factors, one of which was evidence that the children had been left home alone. *Id.* at *1. Other significant facts included lapses in the children's school attendance and homework, one of the children not getting breakfast before school, the children wearing inappropriate or dirty clothes, violence and marital discord in the mother's home, and the children assuming a protective role toward their mother and worrying about her safety. *Id.* Again, the present case does not involve a comparable set of circumstances.

On the third topic, problems with school lunch money and uniforms, Father asserts that the evidence shows a pattern of the children needing lunch money. He testified that, when the children were attending private school, there were "probably a total of forty times" when he had taken lunch money for them to school. Mother testified that Father's trips to school to bring lunch money were "completely unnecessary." She stated that she occasionally forgot lunch money but that there was a petty cash account in the school office for kids who needed lunch money, and Mother would reimburse the school for any money her kids had to use. Mother further testified that she would send a check to refill the children's lunch accounts when she received a note from the school, but when the kids were going to Father's house, she might not receive the note. Mother characterizes the lunch money issue and other issues raised by Father as "trivial, every day occurrences in the lives of most divorced parents."

Father further alleges that Mother did not cooperate with him about getting the children's school uniforms and other clothes to his house during his parenting time. Mother testified that she did not think Father had purchased many clothes for the children and that the children were now old enough that they packed their own clothes to go to Father's house. She further stated that "I have problems getting clothes back from him all the time."

We cannot conclude that the evidence preponderates against the trial court's conclusion that the problems identified by Father did not rise to the level of a material change in circumstances affecting the children's well-being. As emphasized by Father, the court did admonish Mother to take seriously Father's concerns about the ADD medications and the eye examination. These admonitions do not, however, necessitate a finding that the concerns raised by Father amount to a material change in circumstances. Rather, the court was clarifying the parents' responsibilities on these two points. All three children made good grades in school and impressed the court as being well-mannered and "doing great." In its comments from the bench, the court characterized the problems presented by Father as being "typical every day life in families." The two older children told the trial court that they wished to continue living with Mother, and the youngest child declined to give an opinion. Moreover, the trial court was in the best position to evaluate the credibility and demeanor of the parties and to evaluate the seriousness of the issues raised. We find no error in the trial court's determination. As the court did not find a material change of circumstances, there was no need to proceed to a best interest analysis. *Kellett v. Stuart*, 206 S.W.3d 8, 15 (Tenn. Ct. App. 2006).

Petition to modify parenting schedule

Father does not challenge the trial court's finding of a material change in circumstances sufficient to justify a change in the parenting schedule.[7] He makes two other arguments: (1) that the evidence preponderates against the trial court's conclusion that it was in the children's best interest to modify the parenting schedule, and (2) that the trial court abused its discretion in drastically reducing Father's parenting time with the children.

As this court has previously noted, "a finding that a material change of circumstances has occurred does not predetermine the outcome of the best interest analysis and does not require that a change of custody or visitation be made." *Scoggins v. Scoggins*, No. M2007-02148-COA-R3-CV, 2008 WL 2648966, at *5 (Tenn. Ct. App. July 2, 2008); *see also Boyer*, 238 S.W.3d at 259. In making its best interest determination, the court is to consider the factors set forth at Tenn. Code Ann. § 36-6-106(a):

> (1) The love, affection and emotional ties existing between the parents or caregivers and the child;
>
> (2) The disposition of the parents or caregivers to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent or caregiver has been the primary caregiver;
>
> (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment . . . ;
>
> (4) The stability of the family unit of the parents or caregivers;
>
> (5) The mental and physical health of the parents or caregivers;
>
> (6) The home, school and community record of the child;
>
> (7) The reasonable preference of the child . . . ;
>
> (8) Evidence of physical or emotional abuse to the child, to the other parent or to any other person . . . ;
>
> (9) The character and behavior of any other person who resides in or frequents the home of a parent or caregiver and the person's interactions with the child; and

[7] As acknowledged by Father, Tenn. Code Ann. § 36-6-101(a)(2)(C) provides for a less stringent standard with respect to a material change of circumstances pertaining to a residential parenting schedule only, not to a change in the primary residential parent. *Massey-Holt v. Holt*, 255 S.W.3d 603, 608 (Tenn. Ct. App. 2007).

> (10) Each parent or caregiver's past and potential for future performance of parenting responsibilities, including the willingness and ability of each of the parents and caregivers to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child.

Since the trial court did not make specific factual findings, we must make our own determination as to where the preponderance of the evidence lies. *Dillard v. Dillard*, No. M2007-00215-COA-R3-CV, 2008 WL 2229523, at *5 (Tenn. Ct. App. May 29, 2008); *Curtis v. Hill*, 215 S.W.3d 836, 839 (Tenn. Ct. App. 2006).

In this case, factors (1), (4), (5), (9), and (10) favor both parents equally, and factor (8) does not apply. Factors (2) and (3) favor Mother to some extent since she has been the primary caregiver and the trial court found that she had "done an excellent job being the primary parent." The evidence supports a finding that the children's school, extracurricular, and emotional needs would be benefitted by a change in the residential schedule to cut down on problems with homework, clothing, and medication transfers; thus, factor (6) weighs in Mother's favor. Both of the older children opined that changing the residential schedule would be beneficial to them, making factor (7) favorable to Mother. While the children's preferences are not controlling, the court may consider those preferences in combination with other factors. *See In re NRG*, No. E2006-01732-COA-R3-CV, 2007 WL 1159475, at *3 (Tenn. Ct. App. Apr. 19, 2007); *Watson v. Watson*, 196 S.W.3d 695, 702 (Tenn. Ct. App. 2005).

Father argues that "the record is void of any indication that the children had difficulty or were unable to participate in any activity due to Mr. Huffman's parenting time." We cannot agree. Father and Mother testified about problems transferring clothing and medication from one parent's house to the other parent's house. Because Father lives farther from the children's school than does Mother, the children would have to get up earlier in order to get to school on time. Both older children testified that their preference would be to eliminate the overnight visits with Father during the week and on Sunday during the school year. Mother testified that, now that they were older, the children wanted to spend time at home and be able to get ready for school the next day. Overall, we cannot conclude that the evidence preponderates against the trial court's determination that modification of the parenting schedule was in the best interest of the children.

Father next asserts that the trial court abused its discretion in "drastically reducing" his parenting time. Father argues that the changes in the parenting schedule ordered by the trial court drastically reduce his parenting time and result in his seeing the children only every fourteen days. While the trial court's order is not entirely clear, we accept Mother's interpretation stated at oral argument that the court did not eliminate Father's weekly parenting time on Wednesday, but merely provided that the Wednesday parenting time would not be overnight. Therefore, Father can continue to see the children every Wednesday as well as at least every other weekend from Friday until Sunday evening. These changes in the parenting schedule are specifically tailored to address the

problems raised at the hearing; they do not apply during the summer months. We cannot find any abuse of discretion in the trial court's decision as to the new parenting schedule.

Child support

Father argues that the trial court erred in failing to modify his child support obligation and in ordering an upward deviation from the amount of child support required under the child support guidelines.

Setting child support is a discretionary matter. *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). Courts are required to use child support guidelines developed by the Tennessee Department of Human Services "to promote both efficient child support proceedings and dependable, consistent child support awards." *Id.* at 249; *see also* Tenn. Code Ann. § 36-5-101(e); Tenn. Comp. R. & Regs. § 1240-2-4-.01(3)(b), (c). Even with the adoption of the 2005 child support guidelines based upon the income shares model, trial courts retain a certain amount of discretion in their decisions regarding child support, which decisions we review under an abuse of discretion standard. *Richardson v. Spanos*, 189 S.W.3d 720, 725 (Tenn. Ct. App. 2005). Under the abuse of discretion standard, we must consider "(1) whether the decision has a sufficient evidentiary foundation, (2) whether the court correctly identified and properly applied the appropriate legal principles, and (3) whether the decision is within the range of acceptable alternatives." *Kaatrude*, 21 S.W.3d at 248. A trial court abuses its discretion when it applies an incorrect legal standard or reaches a decision against logic or reasoning that causes an injustice to the party complaining. *Eldridge*, 42 S.W.3d at 85.

In considering a petition to modify child support, the trial court must determine whether there is a significant variance between the obligor's current obligation and that set by the guidelines. *See* Tenn. Code Ann. § 36-5-101(g); *Kaplan v. Bugalla*, 188 S.W.3d 632, 636 (Tenn. 2006). The parent seeking to modify a child support obligation has the burden of proving that a significant variance exists. *Wine v. Wine*, 245 S.W.3d 389, 394 (Tenn. Ct. App. 2007). For orders established prior to January 18, 2005, Tenn. Comp. R. & Reg. § 1240-2-4-.05(2)(b) gives several definitions of significant variance. In the present case, the original divorce decree set child support at $1,338.00 per month.[8] The proposed presumptive amount of child support is not reflected in the record, but the parties do not dispute that there was a significant variance in this case.[9]

Where a significant variance exists, the court "shall decree an increase or decrease of support" upon application by either party, "unless the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances that caused the deviation have not

[8] Although the parenting plan did not include income figures, the plan indicated that the child support ordered constituted a deviation from the child support guidelines "based on the Father's increased visitation with the children."

[9] According to a child support worksheet submitted with respect to a later review hearing, the presumptive child support amount was $496.00 per month.

changed." Tenn. Code Ann. § 36-5-101(g)(1). Tenn. Code Ann. § 36-5-101(e)(1)(A) instructs the trial court to apply the child support guidelines as a rebuttable presumption in determining the amount of child support. *See* Tenn. Comp. R. & Reg. § 1240-2-4-.01(d)(1). In this case, the trial court found that both parties had experienced a change in their income but that "the Mother is in need of the current level of child support in the amount of $1,338.00 to adequately support and provide for the children and, therefore, the Father shall pay an upward deviation to maintain that child support level."

Although trial courts have discretion to deviate from the child support guidelines, they must support such a deviation with specific written findings. Tenn. Code Ann. § 36-5-101(e)(1)(A); Tenn. Comp. R. & Regs. § 1240-2-4-.07(1)(b); *Atkins v. Motycka*, No. M2007-02260-COA-R3-CV, 2008 WL 4831314, at *7 (Tenn. Ct. App. Nov. 6, 2008). If, in its discretion, a trial court decides to deviate from the amount of support required by the guidelines, it must state in its order the basis for the deviation, the amount the child support order would have been without the deviation, and why application of the child support guidelines would be unjust or inappropriate. Tenn. Code Ann. § 36-5-101(e)(1)(A); Tenn. Comp. R. & Regs. § 1240-2-4-.07(1)(b); *Atkins*, 2008 WL 4831314, at *7. The court in this case failed to support its deviation from the child support guidelines with specific findings. It failed to give the presumptive amount of child support and did not give specific reasons why application of the guidelines would be unjust or inappropriate. We do not consider a general statement that the mother needs the current level of child support to adequately provide for the children to be a sufficient justification for a deviation. *See Atkins*, 2008 WL 4831314, at *7 (concluding that the court's statement that a deviation was necessary to "maintain the children's lifestyle" was not a specific finding sufficient to support the deviation).

We recognize that there were disputes as to the appropriate income figures for both parties in this case. Prior to ordering a deviation from the child support guidelines, however, the trial court was required to determine the presumptive amount of child support and to give specific reasons to justify the deviation. Because the trial court failed to do so, we vacate the trial court's decision regarding child support and remand for further consideration consistent with this opinion.

Evidentiary issues

Father argues that the trial court erred in excluding two pieces of evidence offered in support of his contempt petition: medical bills and his credit report. Mother objected to the evidence on hearsay grounds, and the trial court summarily rejected these pieces of evidence based upon the fact that they were obtained from the internet.

Under Tenn. R. Evid. 103(a)(2), a reviewing court may not predicate error on the exclusion of evidence unless there is an offer of proof such that "the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context." The party appealing the exclusion of evidence must have made an offer of proof to enable the appellate court to determine whether the trial court's exclusion of the evidence was reversible error. *Dossett v. City of Kingsport*, 258 S.W.3d 139, 145 (Tenn. Ct. App. 2007). Where

the excluded evidence is a document, "the item should be marked for identification and filed with the court at the time of the offer of proof." Neil P. Cohen et al., TENNESSEE LAW OF EVIDENCE § 1.03[5][d] (4th ed. 2008). Our review is "frustrated if the official record fails to contain the evidence which is the object of appellate scrutiny." *Id*. at § 1.03[6][e]. When an offer of proof has not been made, appellate courts generally will not consider whether the evidence should have been excluded. *Dossett*, 258 S.W.3d at 145. Father has not provided this court with the excluded documents; thus, the issue of the exclusion of the evidence is waived.[10]

Attorney fees

Father argues that the trial court erred in finding his petition frivolous and in awarding Mother her attorney fees. Because the trial court did address several of the issues raised by Father and grant him some relief, including ordering a medical evaluation regarding the oldest child's ADD medications, we disagree with the trial court's determination that his petition was frivolous. However, the award of attorney fees is within the trial court's discretion. *Huntley v. Huntley*, 61 S.W.3d 329, 341 (Tenn. Ct. App. 2001). Tenn. Code Ann. § 36-5-103(c) gives a court discretion to award attorney fees incurred in defending against a petition to modify custody. We find no abuse of discretion in the court's use of its discretionary authority to award Mother her attorney fees in this case.

Mother asserts that Father's appeal is frivolous and urges this court to award her her attorney fees on appeal. We decline to find Father's appeal frivolous. Tenn. Code Ann. § 36-5-103(c) gives this court discretion to award attorney fees on appeal. *Pippin v. Pippin*, 277 S.W.3d 398, 407 (Tenn. Ct. App. 2008). Having considered all of the circumstances in this case, including Father's successful argument with respect to the trial court's child support deviation, we decline to award Mother her attorney fees on appeal.

CONCLUSION

The decision of the trial court with respect to child support is vacated and remanded for further proceedings consistent with this opinion. Otherwise, the trial court's decision is affirmed. Costs of this appeal are assessed equally between the parties.

ANDY D. BENNETT, JUDGE

[10] We note that evidence obtained from the internet may be admissible with proper authentication and pursuant to applicable hearsay exceptions. *See generally* 2 MCCORMICK ON EVIDENCE §§ 227, 294 (6th ed. 2006).